THE STATE BAR OF CALIFORNIA
INSURANCE LAW COMMITTEE of the BUSINESS LAW SECTION

APPELLATE LAW UPDATE

November 2, 2007
San Francisco, CA

Supreme Court

There is not recent Supreme Court activity to report.

Courts of Appeal

Contribution

Edmondson Prop. Management v. Kwock (5th Dist., Oct. 18, 2007) ___ Cal. App. 4th ___ [07 C.D.O.S. 12405]. In equitable contribution action between the insurers of two joint tortfeasors, the general rules of equitable contribution apply absent express language in an underlying contract between the tortfeasors demonstrating the intent to convert one party's insurance coverage to "excess" coverage.

In a property management agreement between property owner (insured by Cal. Capital Ins. Co.) and property management company (insured by Farmers), the property owner agreed to indemnify property manager from premises liability claims. Following a slip and fall on the property, both property owner and property manager were sued. Property manager's carrier (Cal. Capital) settled the claim and sued Farmers for equitable contribution. Farmers took the position that granting contribution to Cal. Capital would nullify and defeat the purpose of the indemnity provision of the property management agreement, and that the agreement should therefore render Farmer's coverage excess rather than primary.

Court of Appeal closely construed property management agreement and concluded that the language of the agreement did not "clearly demonstrate" the parties' intention to make the property manager's insurance coverage excess of the coverage of the property owner. "The insurance company seeking to defeat a claim of equitable contribution must prove that the indemnification agreement would bar **any recovery** between the insureds before it can successfully claim equitable contribution would negate the negotiated contract between the insureds."

Discovery

1. ***Zurich American Ins. Co. v Superior Court (Watts Indust.)*** (2nd Dist., Div. 4, Oct. 11, 2007) ___ Cal. App. 4th ___ [Docket No. B194793]. Writ of mandate issued to reverse trial court's order compelling insurer to produce insurer's internal documents concerning case reserves and reinsurance.

In determining whether internal documents were within insurer's attorney-client privilege and attorney work product, trial court applied too restrictive a standard for privilege – that the privilege only applies to direct communication between an attorney and her client. Proper two-pronged analysis is: (1) whether the document contains a discussion of legal advice or strategy of counsel, or includes a legal opinion formed and the advice given by the lawyer in the course of the relationship (i.e., does the document contain or embody confidential communications); and if so, (2) whether the privilege was waived by distributing the communication too broadly within the company (i.e., beyond those employees of the client with a "need to know" or beyond those employees "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." Court also includes a short discussion on the three commonly encountered limitations on the attorney-client privilege: (i) including an in-house counsel in an otherwise non-privileged communication does not bring the communication within the privileged; (ii) relevant and otherwise discoverable *facts* cannot be shielded from discovery simply by including them in a communication with counsel; and (iii) attorney-client privilege is inapplicable where the attorney acts in the role of a "business agent" rather than as counsel.

2. ***Unzipped Apparel v. Bader*** (2nd Dist., Div. 1, Oct. 17, 2007) ___ Cal. App. 4th ___ [Docket No. B193327]. Statutory 60-day deadline to move to compel compliance with document subpoena issued to third party (i) applies even in the absence of a deposition of the custodian of records, and (ii) runs from the date objections are served.